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IN THE COURT OF APPEALS OF INDIANA

KIRK ALAN BRANTLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 87A01-0803-CR-120
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WARRICK SUPERIOR COURT
The Honorable Robert R. Aylsworth, Judge
Cause No. 87D02-0705-FB-057

October 21, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Kirk Alan Brantley appeals his conviction of Rape,[1] a class B felony, Confinement,[2] a class C felony, Sexual Battery,[3] a class D felony, and Attempted Criminal Deviate Conduct,[4] a class B felony. Brantley presents the following restated issue for review: Was the evidence sufficient to support the convictions?

We affirm.

The facts favorable to the convictions are that A.L. worked at Keggers as a part-time bartender. Brantley worked at Keggers as a bouncer. The two knew each other by virtue of their common employment, but did not socialize with one another outside of work. On the evening of May 22, 2007, A.L. and Brantley, both off duty, were drinking together at Keggers. When the bar at Keggers closed at around 1:00 a.m., A.L. and Brantley decided to continue drinking at another establishment. They drove in Brantley's truck to a couple of bars that were either closed or just closing when the two arrived. They finally arrived at Hootie Hoots and ordered a pitcher of beer. While there, A.L. sat by the bartender near the pool room while Brantley spoke to patrons in the pool room. A.L. drank sparingly after throwing up twice.

When Hootie Hoots closed, Brantley informed A.L. that he was too drunk to drive all the way home and suggested they drive to the nearby apartment of a friend. A.L. agreed, but told Brantley she needed to be at work by noon that day. When they arrived at Brantley's friend's apartment, Brantley showed A.L. a bedroom where she could sleep and told her that

[1] Ind. Code Ann. § 35-42-4-1 (West, PREMISE through 2007 1st Regular Sess.).
[2] I.C. § 35-42-3-3 (West, PREMISE through 2007 1st Regular Sess.).
[3] I.C. § 35-42-4-8 (West, PREMISE through 2007 1st Regular Sess.).

he would sleep on the couch. Brantley left the bedroom and A.L. took off her shoes and socks and lay down on the bed. Soon thereafter, Brantley re-entered the bedroom wearing the swim trunks and t-shirt he had worn throughout the evening. A short time later, A.L. saw by the light in an adjacent bathroom that Brantley was naked. Brantley climbed onto the bed next to A.L. and told her that she "had been asking for it all night." *Transcript* at 114. A.L. "kind of started flipping out" and told Brantley that her brother lived nearby and if she needed to, she could call him to pick her up. *Id*.

Brantley began pulling A.L.'s hair and shoving her face into the bed such that she had difficulty breathing. He ordered her to take off her pants and she began to comply. Brantley finished removing her pants and then removed her panties. He attempted to have intercourse with A.L. and succeeded in briefly partially penetrating her two or three times, but A.L. "kept flipping and like rolling around to get away from him" while Brantley retained "a good grip" on A.L.'s upper body. *Id*. at 115. A.L. described the remainder of the incident as follows:

> He just couldn't do what he wanted to do with below because I was wiggling around. I had gotten away and he caught me and threw me back on the mattress, tried to penetrate me anally as he was shoving my head into the bed and pulling on my hair. I had been screaming for help. He flipped me over at one point and as I was screaming for help I could hear a dog barking in the background and he was covering my mouth. And when he did that I decided to start holding my breath because if I passed out, maybe he would leave me alone. But he wouldn't. So I started kicking and scratching him as much as I could to try and hurt him to get off of me. I remember being down on the floor as he was sitting on the edge of the bed. And he wanted me to go down on him and I wouldn't. … [Brantley said] [i]t's either go down on him or he was going to take it from behind. So I eventually got up and he had a hold tight of my hair. So I ripped my head off – away from him – and when I did he, you

[4] Ind. Code Ann. § 35-41-5-1 (West, PREMISE through 2007 1st Regular Sess.) (attempt), and I.C. § 35-42-4-2 (West, PREMISE through 2007 1st Regular Sess.) (criminal deviate conduct).

> know, had a hand full of hair. I ran out of the bedroom, through the living room, and found the front door. I remember running into the wall next to the door and I got out.

Id. Wearing only a shirt, A.L. ran several blocks to her brother's apartment. Her brother did not respond to her knocks at his door, so A.L. knocked on the doors of his neighbors. She eventually roused three neighbors, one of whom gave her a pair of shorts to put on while the other two called 911. As a result of the attack, A.L. lost some hair, suffered a black eye, a bloody nose, a swollen lip, an abrasion on her knee, and extensive bruising on several parts of her body.

Police arrived a short time later and photographed A.L.'s injuries. Within hours of the attack, police executed a search warrant of the apartment where the attack occurred and collected evidence. Brantley was charged with rape, battery, sexual battery, and attempted criminal deviate conduct. He was found guilty on all counts following a jury trial.

Brantley challenges the sufficiency of the evidence supporting each conviction. When considering a challenge to the sufficiency of evidence, we neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). This review "respects 'the [fact-finder]'s exclusive province to weigh conflicting evidence.'" *Id*. at 126 (quoting *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001)). Considering only the probative evidence and reasonable inferences supporting the verdict, we must affirm "'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *McHenry v. State*, 820 N.E.2d at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

We begin with the claim that the evidence does not support the rape conviction. In order to obtain a conviction for rape in this case, the State was required to present evidence establishing beyond a reasonable doubt that Brantley knowingly or intentionally had sexual intercourse with A.L. when A.L. was compelled by force or imminent threat of force to do so. I.C. § 35-42-4-1. Sexual intercourse in this context requires proof of penetration. *See Thompson v. State*, 674 N.E.2d 1307 (Ind. 1996). Reduced to its essence, Brantley's challenge with respect to this conviction is that the evidence did not establish penetration. The evidence belies this assertion. A.L. not only testified that Brantley raped her, but she specifically stated that he penetrated her vagina. This was sufficient to prove penetration. It is not fatal to the State's case, as Brantley's claims it is, that A.L. at one point in her testimony stated "I think he penetrated me maybe two or three times, cause I kept flipping and like rolling to get away from him …." *Transcript* at 114-15. To the extent this answer was equivocal, we believe it is more likely that A.L. was unsure of the number of times she was penetrated than it is that she was unsure she was penetrated in the first place. In any event, A.L. stated unequivocally that she was penetrated. It was the jury's duty to resolve any conflicts in her testimony, and we will not invade its province in that regard. *McHenry v. State*, 820 N.E.2d 124.

We turn now to the sufficiency of the evidence proving criminal confinement. In order to prove criminal confinement, the State is required to prove the defendant knowingly or intentionally confined another person without the other person's consent. I.C. § 35-42-3-3. It appears that Brantley's challenge to the evidence with respect to this conviction consists

of a general attack on A.L.'s credibility. In this regard, Brantley points out that A.L. initially went to the scene of the attack willingly, which no one disputes and which is irrelevant on the facts of this case. Next, Brantley points out several supposed inconsistencies in A.L.'s testimony. Most if not all of these alleged inconsistencies are not, in fact, inconsistencies at all. In any event, A.L. testified that Brantley held her by the hair on her head as she attempted to flee from the apartment, and that she escaped only when she pulled away from him with enough force that he pulled the hair out of her head. This evidence was sufficient to support the confinement conviction.

Brantley contends the evidence does not support his conviction for sexual battery. The gravamen of his argument on this point is summarized in the following sentence: "Again, the forensics testing did not find any evidence of Mr. Brantley on the victim, nor did they find any dispositive evidence, short of [A.L.]'s testimony that Mr. Brantley was even there that evening." *Appellant's Brief* at 25.

Sexual battery is statutorily defined as "[a] person who, with intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person, touches another person when that person is [ ] compelled to submit to the touching by force or the imminent threat of force." I.C. § 35-42-4-8. A.L.'s testimony alone was sufficient to establish all of the elements of this offense. Moreover, with respect to the force element of the offense, her testimony was corroborated by evidence of injuries she suffered as a result of Brantley's efforts to force her to submit to his demands. To the extent this argument represents a request to reweigh the evidence and re-assess A.L.'s credibility, we decline to do so.

McHenry v. State, 820 N.E.2d 124.

Finally, Brantley contends the evidence was not sufficient to prove attempted criminal deviate conduct. To obtain a conviction of this offense, the State must prove beyond a reasonable doubt the defendant knowingly or intentionally engaged in conduct that constituted a substantial step toward the commission of the offense of deviate sexual conduct when the other person was compelled to submit by force or imminent threat of force. *See* I.C. § 35-41-5-1 and I.C. § 35-42-4-2. "Deviate sexual conduct", in turn, is defined as an act involving "(1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object." I.C. § 35-41-1-9 (West, PREMISE through 2007 1st Regular Sess.).

As with the claims addressed above, Brantley's argument in this regard consists primarily of a claim that A.L.'s testimony was fraught with inconsistencies and thus incredible, and that it was not corroborated by the presence of DNA evidence from Brantley on A.L.'s body. The first claim is not supported by the facts and the second is legally infirm. A.L.'s testimony was not internally inconsistent, much less fatally so. She testified that Brantley attempted to force her to perform oral sex on him, and also attempted to forcefully insert his penis into her anus. Her testimony with respect to either act was sufficient to support a conviction for attempted criminal deviate conduct. It is of no moment that there was no physical evidence such as sperm or semen linking Brantley to the attack. *See Purter v. State*, 515 N.E.2d 858 (Ind. 1987).

Judgment affirmed.

DARDEN, J., and BARNES, J., concur